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THE ESPIONAGE CASES. — Under Title I, Section 3, of the Espionage Act as amended May 16, 1918, there seems but little room for any public discussion adverse to the war policies of the national government. The question of constitutionality seems alone to remain, and if the amended act is held to be constitutional, the power of Congress to abridge the time-honored right of freedom of speech will seem well established.

Prior to the amendment, the original Espionage Act of June 15, 1917, if properly interpreted, could well be held constitutional. But the decisions under the original act are, to say the least, unfortunate. The constitutionality of that act is not here in question. It is the construction and interpretation which the courts have put upon Title I, Section 3[1] to which our attention is directed. Freedom of speech, being a constitutional guaranty, cannot be abridged in times of stress and strain any more than when the country is at peace.[2] And it is submitted that

[1] This section provides: "Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with the intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, and whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting and enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

[2] It is contended by some that the Constitution itself can be suspended during times of stringency. But the Constitution is not alone a peace document; it enumerates and restricts the powers of Congress in times of war as well as peace, and in exercising a power delegated to it by the Constitution Congress cannot so exercise that power as to violate some restrictive provision. See *Ex parte* Merryman, Taney's Reports, 246; *Ex parte* Milligan, 4 Wall. (U. S.) 2. *Cf.* United States *v.* Stokes, Dep't of Justice, Bulletin No. 106.

any statute which tends to limit liberty of expression ought to be construed in the light of the freedom-of-speech clause, so as not to restrict utterances any more than the actual words of the statute require.

Furthermore, the Espionage Act is a criminal statute, and it is a well-established rule of construction that criminal statutes be strictly construed. Yet some courts have included all men within the ages of 18 and 45 as part of "the military and naval forces of the United States." [3] Certainly the same courts would balk at holding such men, not actually in the military service, as subject to court-martial and military law and hence deprived of the right of trial by jury.[4] So, too, the words "recruiting and enlistment service" have been construed to include conscription under the Selective Service Act.[5] Congress was aware of the Draft Law at the time of the passage of the Espionage Act, and had it meant an interference therewith to be a crime under the Espionage Act, it should have said so.

The statute imposes a penalty for the wilful utterance of false statements. Such, it is submitted, means wilful false statements of facts. "This is a capitalists' war" [6] — "The Government is for profiteers" [7] — "The Selective Service Act is unconstitutional" [8] — are clearly statements of opinions. The causes of the war cannot be proven as facts. Yet some courts seem to think so, for the President's address to Congress recommending a formal declaration of war for the reasons therein set forth, was admitted in evidence to prove the falsity of a defendant's utterances.[9] To follow this to its logical conclusion would brand as seditious all utterances at variance with the statements of those in governmental positions and adverse to their war policies, and yet allow all criticisms, honest or vicious, in favor of waging a more vigorous war.

The convictions under the Espionage Act have been for attempts to cause its violation; attempts by wilful false statements to interfere with the operation of the military or naval forces, or to cause insubordination or mutiny, or for attempting wilfully to obstruct the recruiting and enlistment service. Attempts, to be punishable, must come dangerously near success and yet fall short of it.[10] The purchase of a gun or

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[3] United States *v.* Sugarman, Dep't of Justice, Bulletin No. 12; United States *v.* Kirchner, *Ibid*, Bulletin No. 69; United States *v.* Stokes, *supra. Contra*, United States *v.* Ves Hall, 248 Fed. 150; United States *v.* Frerichs, Dep't of Justice, Bulletin No. 85; United States *v.* Hitt, *Ibid.*, Bulletin No. 53; United States *v.* Brinton, *Ibid.*, Bulletin No. 132.

[4] The fifth amendment of the federal Constitution guarantees trial by jury to all those not in the military or naval forces of the United States.

[5] United States *v.* Hitt, *supra;* United States *v.* Stokes, *supra;* United States *v.* Waldron, Dep't of Justice, Bulletin No. 79. *Contra*, United States *v.* Brinton, *supra. Cf.* Babbitt *v.* United States, 16 Ct. Cl. 202, 213; Lanahan *v.* Birge, 30 Conn. 438, 443.

[6] United States *v.* Pierce, Dep't of Justice, Bulletin No. 52.

[7] United States *v.* Stokes, *supra.*

[8] United States *v.* Kirchner, *supra.*

[9] United States *v.* Stokes, *supra.*

[10] See Joseph H. Beale, Jr., "Criminal Attempts," 16 HARV. L. REV. 491, 501.

poison with the intent to kill is not a punishable attempt at murder.[11] The sin of discharging a gun with the intent to kill a man a thousand miles away is as great as the sin of shooting at one within range and missing, yet the former has no legal cognizance. If writing a letter from Alaska to a firm in San Francisco requesting a shipment of liquor to Alaska, the importation of which into said territory is a crime, is not an attempt to commit the crime until the liquor is brought near the borders, headlands, or waters of Alaska,[12] it is hard to see how addresses made before a woman's club or at a distance from army cantonments, can be held to be attempts to cause insubordination and mutiny in violation of the Espionage Act.[13] So, too, publications to the effect that this is a capitalists' war, or that the government is for profiteers, though such papers are likely to reach army cantonments and are sure to be read by those at home who are subject to call, can scarcely be held to be attempts.[14] Assuming the statements to have been false statements of facts, and assuming their utterers to have intended to cause a violation of the law, the question should have been how dangerously near success did the attempts come. True, the boys in the service at home and abroad might be cheered by a universal enthusiastic sentiment at home, but how many would ever hear or listen to such statements of a minority, much less be influenced by them? How many wives, mothers, fathers, sisters, brothers, or sweethearts would on such talk encourage their own male relatives to violate the law? The line is not an easy one to draw; each case must be decided upon its own merits. But it seems that so long as the words do not tend directly, using the objective standard, to cause insubordination or mutiny, do not tend directly to obstruct the recruiting and enlistment service, or directly to interfere with the operation of the military and naval forces, that an attempt to violate the statute has not been committed. This was the view taken by the court in *United States* v. *Schutte*[15] and by the lower court in *Masses Publication Co.* v. *Patten*.[16] In the latter case the postmaster excluded the plaintiff's publication from the mails on the grounds that it was in violation of the Espionage Act. The plaintiff sought to enjoin the postmaster from so doing, and in granting the injunction Judge Learned Hand said: "Political agitation may in fact stimulate men to break the law. De-

[11] These are considered mere preparations and not attempts. See People *v.* Murray, 14 Cal. 159; Commonwealth *v.* Kennedy, 170 Mass. 18, 48 N. E. 770. See also 16 HARV. L. REV. 491.

[12] United States *v.* Stephens, 12 Fed. 52.

[13] *Cf.* United States *v.* Stokes, *supra;* United States *v.* Schutte, 252 Fed. 212; Masses Pub. Co. *v.* Patten, 244 Fed. 535, overruled in 246 Fed. 24.

[14] In United States *v.* Stokes, *supra*, the court said: "There are the mothers, fathers, wives, sisters, brothers, sweethearts and friends of these men (men in the service and those registered for the draft), in fact all the complex life of communities which, in the aggregate, with others of like nature, make up the life and physical forces of the nation. If the statement made in this letter and the resulting attitude therein voiced should meet with credence and acceptance by any appreciable number of its readers, could they fail to produce a temper and spirit that would interfere, tend naturally and logically to interfere, with the operation and success of the military and naval forces of the United States?"

[15] 252 Fed. 212.

[16] 244 Fed. 535.

testation of existing policies is easily transformed into forcible resistance, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation with direct incitement to violent resistance is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom, and the purpose to disregard it must be evident when the power exists." The Circuit Court, in overruling Learned Hand and in dissolving the injunction,[17] laid down the seemingly unsound proposition that he who utters words at any time or place with the specific intent to cause a violation of the Espionage Act, is criminally liable therefor.[18] In attempting to further strengthen its position the court stated that it was powerless to reverse the decision of the postmaster unless he was clearly wrong. It is true that decisions of administrative boards or officers are final as to questions of fact, and reversible by the courts only when clearly wrong.[19] But to exclude matters from the mails on the grounds that they are criminal attempts in violation of the Espionage Act, as it originally stood, calls for a construction of the statute, which is a judicial question, clearly reviewable by the courts and reversible unless clearly right.[20]

In no case was the law of criminal attempts considered, and in only a few were the ordinary established rules of construction applied. During the Civil War, when a real menace to personal liberty presented itself, the judges fearlessly applied the law.[21] Today there are convictions; on appeal the government confesses error without opinion;[22] and those who cannot appeal go to jail, some rightfully, others perhaps wrongfully. The decisions are permeated with a laudable spirit of loyalty, but true patriotism consists as much in protecting the legal and constitutional rights of individuals as it does in giving the government an undivided and whole-hearted support.[23]

INJURIES BY TRESPASSING ANIMALS. — In the simple conception of liability that refers everything to the human will, one is held legally upon a legal transaction, in which he willed liability, or because of a wrongful act, in which he willed something culpable. But liability at one's peril for situations dangerous to the general security, without

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[17] 246 Fed. 24.

[18] The decision of the Circuit Court was so interpreted and followed by Judge Learned Hand in United States *v.* Nearing, 252 Fed. 223, and in United States *v.* Eastman, 252 Fed. 232.

[19] United States *v.* Ju Toy, 198 U. S. 253. See 32 HARV. L. REV. 433.

[20] Chin You *v.* United States, 208 U. S. 8; Gonzales *v.* Williams, 192 U. S. 1; Gegiou *v.* Uhl, 238 U. S. 620. See 32 HARV. L. REV. 433.

[21] See *Ex parte* Merryman, *supra; Ex parte* Milligan, *supra.*

[22] See Baltzer *v.* United States, U. S. Supreme Court, October Term, 1918, No. 320; Head *v.* United States, *Ibid.*, No. 321; Kornmann *v.* United States, *Ibid.*, No. 548.

[23] See Zechariah Chafee, Jr., "Freedom of Speech," 17 NEW REPUBLIC, No. 211, 66.